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the deceased was a Mohamedan. If the law recognises the rights of an executor to obtain or retain possession of a corpse, the same rights may reasonably be extended to the nearest relation of the deceased in the absence of an executor, and where two nearest relations belonging to different religions dispute as to the religious rites or custom, according to which the funeral of the deceased should be conducted and the dead body buried, it is only fair and equitable to extend the rights to the one who belongs to the same religion as the deceased.

### INCOME-TAX REFERENCE.

*Before Sir Guy Ruddle, Kt., K.C., Chief Justice, Mr. Justice Chari and Mr. Justice Brown.*

1929  
 June 13.

### COMMISSIONER OF INCOME-TAX-

v.

### THE BURMA CORPORATION, LIMITED.\*

*Income-tax Act (XI of 1922), s. 10 (2) (ix)—Contributions by Company to Provident Fund of its employees—Trust-deed and Trustees created for Provident Fund—Object of Trust to secure liability of Company, not to vest moneys in Trustees—Company's creation of book-debts in favour of employees and Trustees for contributions but retaining control and use of the money—Liability of Company to be assessed for such moneys—Exemption only when Company loses all control and moneys vest in Trustees.*

The Burma Corporation, Limited, started a Provident Fund for their employees. The employees' subscriptions were paid into "A" account, and the Corporation's contributions were paid into "B" and "C" accounts. In 1926 the Corporation created a Trust in respect of the Provident Fund and handed to the Trustees Government securities of the approximate value of the amount which the Corporation at that time was liable for contribution to the Provident Fund. From the terms of this Trust it appeared that its object was not to create a fund in cash vested in the Trustees over which the Corporation had lost all control, but to create a body which would be able to secure for the members satisfaction of the liability of the Corporation. Until the Trustees called upon the Corporation to supply any moneys or security to meet their liability for contribution, the Corporation was not bound to

\* Civil Reference No. 5 of 1929.

pay over the moneys in the "A", "B" and "C" accounts and these could remain under the full control and use of the Corporation. The contributions of the Corporation to the Provident Fund for the year ending June 1927 were assessed to income-tax and super-tax payable by the Corporation.

*Held*, that the contributions of the Corporation to its Staff Provident Fund were not assessable to income-tax and super-tax if the money had actually been paid to the Trustees and the Corporation had lost all control over and the use of the money. And this was so, notwithstanding the possibility of the Trustees having to refund a portion of the money to the Corporation on the happening of certain events as provided in the Trust-deed. When so refunded the moneys would be an addition to the income of the Corporation of that year and as such assessable. But if the Corporation merely created a book liability in favour of the employees or the Trustees and used the moneys as their own, they could not claim exemption from income-tax.

*British Insulated and Helsby Cables, Limited v Atherton*, [1926] A.C. 205—*referred to*.

*Gaunt* (Officiating Government Advocate) for the Crown.

*Clifton* for the assesseees.

RUTLEDGE, C.J., CHARI and BROWN, JJ.—This is a reference by the Commissioner of Income-tax under section 66 (2) of the Indian Income-tax Act. The circumstances under which the reference is made are that the Burma Corporation Limited had started a Provident Fund for their employees. By the terms of the rules of the Provident Fund, which is controlled by the Directors of the Corporation, it is provided that, in respect of the employees, who are divided into two classes, an amount equal to  $8\frac{1}{2}$  per cent. of the salary in the case of Class I and 5 per cent. in the case of Class II should be debited monthly from the salary of the employee. This amount was credited to an account which is called the "A" account and the Corporation agreed to pay interest at the rate of 5 per cent. per annum on the amount so credited which was added to the principal once every six months. The Corporation contributed

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a bonus equal to the amount deducted from his salary and this amount was credited in a separate account called the "B" account and interest was added to this sum in the same manner as in respect of the sums under the "A" account. There was also a "C" account which was another bonus credited to the employee proportioned on the dividend paid by the Corporation and the amount of the salary of the employee.

It will thus be seen that while the money in "A" account was the employee's own money, the moneys in the "B" and "C" accounts were the contributions made by the Corporation.

Rule 13 of the Provident Fund Rules provided that if any member were dismissed, he was entitled only to the amount standing to his credit in "A" account and the interest which had accrued thereon and that all the moneys credited to his "B" and "C" accounts should remain the property of the Corporation; and Rule 14 specifically provided that no member *acquired any right* in or to the moneys standing to his credit in "B" and "C" accounts.

In November 1926 the Corporation started a Trust in respect of the Provident Fund, to the terms of which we shall refer more in detail later. On the 31st December 1925 the liability of the Corporation in respect of the Provident Fund amounts payable to the members amounted to Rs. 12,58,782-4-11. By the Trust Deed three persons mentioned therein were made Trustees and Government securities of the nominal value of Rs. 14,25,000 and the actual value at market rate of Rs. 12,61,125 were made over to them. It will be seen that no money was entrusted to the Trustees, but the transfer of the securities to the Trustees may be considered as a payment of the equivalent of money to them or the

money may be considered as having been actually advanced to them in cash and taken back by the Corporation as a loan on the security of the Government promissory notes.

The point for consideration on this reference is whether the contributions of the Burma Corporation to the Provident Fund for the year ending with June 1927 are assessable to income-tax and super-tax. The learned Commissioner in his reference states, a statement with which we are in entire agreement—that it is not clear whether the contributions for the year in question were actually paid to the Trustees, but in order not to complicate matters he is willing to assume that the sum representing the contributions of the Company was actually paid over to the Trustees. In making this concession, the Commissioner practically concedes the whole case, because in our opinion, the non-liability of the Corporation to assessment or otherwise, depends entirely on whether the Corporation has or has not parted with the money. Fortunately the form of the question enables us to answer it in such a way as to enable the Commissioner, to make enquiries on this point and adopt the course consonant with the result of his enquiries.

The contention of the Corporation seems to be that when the amounts are credited to the Trustees, it is entitled to a deduction of this amount from the amount for which it is assessable to income-tax and super-tax. The Commissioner admits that the contributions to the Provident Fund under an irrevocable Trust are allowable expenditure under section 10 (2) (ix) of the Income-tax Act, but he contends that this section would apply only when there is an irrevocable Trust and when the employer has finally parted with his contributions. He is of opinion, on a construction

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of the trust-deed, that there is no question of any irrevocable trust since there are many contingencies dependent on the will of the Corporation on the happening of any of which the Corporation can reduce their liability and recover their contribution. The Corporation, on the other hand, contends that the trust is none-the-less an irrevocable trust, simply because in certain contingencies the Corporation will be able to get back its contributions. In this contention, the learned advocate for the Corporation is in the right. Even without any express provision in the trust-deed where the purposes for which the trust is created have been fulfilled or fail there will be a resulting trust in favour of the author of the trust of any undisposed of amount in the hands of the Trustees. This does not, however, dispose of the matter because the real point is a different one.

We shall now refer to a case which has been cited before us. *In the British Insulated and Helsby Cables, Limited v. Atherton* (1), the facts were somewhat similar to the facts of the present case. There a pension fund was created and was constituted by a trust-deed. The company contributed a sum of £31,784 to form the nucleus of the fund and to provide for payment in respect of the past years of service of the employees. It was practically admitted in that case that this money must be deemed to have been wholly and exclusively laid out for the purpose of the trade and therefore deductible under the provisions of the English Income-tax Act corresponding to those in our own Act; but it was contended that it was in the nature of a capital expenditure, and therefore the Company was not entitled to any deduction. The point actually decided was only in respect of the sum of

(1) [1926] A.C. 205.

£31,784, it being conceded that yearly payments by the company equivalent to the deductions out of the salary of the members would be entitled to be deducted from the current year's income. It is not, for the purposes of the case before us, necessary to refer to more in this judgment than a significant passage in the judgment of Lord Atkinson.

At page 219 of the report he gives a summary of the terms of the trust-deed created by the British Insulated and Helsby Cables. After setting out the important provisions of the deed he concludes as follows :—

“The trust-deed contains many other provisions supporting the conclusion that the company have once and for all parted with all proprietary rights in and all powers over this donation of £31,784.”

This ruling was relied upon by the learned advocate for the Corporation, as an authority which shows that payment to the Trustees of a Fund would enable a Company to claim deduction of the amount so paid, in the same way as a payment to the employee direct but the concluding passage cited above clearly shows that the real test is whether the Corporation actually pays the money to the Trustees and loses all its proprietary right in and all powers over the sums so paid. The mere fact that in some cases it may be entitled to get back a portion of the amount paid out makes no difference in the legal position.

Turning now to the trust-deed before us: the powers of the Trustees are contained in clause 2 of the trust-deed. They are six in number.

Clause (a) makes it obligatory on the Trustees to realise any portion of the provident Trust Fund represented by any security if the Corporation desire it to be so realised ;

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Clause (b) makes it obligatory on the Trustees to re-invest the amount so realised in such other securities as the Corporation may direct ;

Clause (c) provides that whatever sum there may be in the hands of the Trustees in excess of the liability of the Corporation shall be held by them in trust for the Corporation who may from time to time recover such excess ;

Clause (d), which is the most important clause, provides that the Trustees shall stand possessed of the corpus and income of the Provident Trust Fund on trust for the members for the time being of the Provident Fund and upon a winding up of the Provident Fund or of the undertaking of the Corporation, upon trust to apply all moneys in their hands in satisfaction of the claim arising under the rules and secondly in payment of the entire balance to the Corporation ;

Clause (e) provides that the income of the Provident Fund, if any, is subject to the trusts declared by sub-paragraph (d) payable to the Corporation ;

Clause (f) provides that if the Trustees shall at any time be unable lawfully to apply the Provident Trust Fund and the income thereof or any part of such fund, then the trusts hereby created shall determine and the Provident Fund and the income thereof shall forthwith be made over to the Corporation.

Paragraph 3 provides that whenever on any of the accounting days it shall be ascertained that owing to market depreciation of the securities the corpus of the Provident Fund is less than the amount of the liability of the Corporation then the Corporation will pay to the Trustees a further such sum as will be necessary to make good the deficiency in cash or some security or securities authorised by the law of

British India for the investment of Trust Funds or partly one or partly by the other.

The noticeable feature of this trust deed is that there is no obligation on the Corporation to make periodical payments of any sum whatever to the Trustees. The deductions out of the salary carried in "A" account is not paid to them nor are the contributions of the Corporation carried in the "B" and "C" accounts.

It is true that the Trustees have the power whenever any security they may have in their hands is short of the liability of the Corporation to call on the Corporation to supply that deficiency either by cash payment or by furnishing further security, but till the Trustees think fit to act on this clause, there is no obligation on the Corporation to make any payment. The credit in the accounts in favour of the employees or the Trustees makes no difference. The object of the Trust, as far as one can see, is not to create a fund in cash vested in the Trustees over which the Corporation have lost all control and proprietary rights, but to create a body which would be able to secure for the members satisfaction of the liability of the Corporation. As is seen from the remarks in Lord Atkinson's judgment, the real ground on which the Corporation can claim exemption from payment of income-tax is that they have actually parted with the money. The transfer of a book debt, even assuming that as from the date of the trust-deed the Trustees are the persons credited in the "A", "B" and "C" accounts on behalf of the members does not mean that the Corporation have either parted with the money or lost control over it. In our opinion therefore, the Corporation will be entitled to deduct from the amount assessable to income-tax the actual cash payments made to the

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Trustees either for the purpose of meeting liabilities of the retiring or deceased members as they arise or for the purpose of supplying any deficiency as contemplated by paragraph 3 of the trust-deed. They are not entitled to any deduction in respect of the sums merely carried in the account, as the mere creation of a book liability whether in favour of the employees or Trustees is not equivalent to a payment.

The difference between the Corporation and the Commissioner was merely as to the point of time when the Corporation becomes entitled to a deduction for these amounts. The Commissioner, in view of the provisions of the trust-deed, was of opinion that the Corporation is entitled to a deduction only when the amount payable to the employee has been paid to him. In this, he is wrong because the Corporation, notwithstanding the provisions of the deed, would be entitled to deduction if it has actually paid the amount of its yearly contributions to the Trustees in such a way as to have lost their proprietary right in and control over them. The Trustees will hold the money primarily as Trustees for the employees, though in certain cases, a portion of the money may become repayable to the Corporation. When the moneys are so repaid they will be an addition to the income of that year and as such assessable. The contention of the Corporation is not quite clear. If the position of the learned advocate of the Corporation is that by a mere credit in favour of the Trustees instead of the employees, and the creation of a liability to the Trustees for the payment of these contributions, the Company can deduct the amounts so credited from the assessable sum, notwithstanding they have full control over and unlimited use of the money represented by the credit, we cannot accept his contention.

Our answer to the reference therefore is that the contributions of the Burma Corporation Limited to its Staff Provident Fund are not assessable to income-tax and super-tax, if the money had actually been paid to the Trustees and the Corporation has lost the control over and the use of, the money.

In these circumstances we make no order as to costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Baguley.*

U AHDEIKSA

v.

MA SAN ME AND ANOTHER.\*

1929  
 July 22.

*Buddhist Ecclesiastical Law—Pongyi in occupation of a kyaung, rights of—Donor whether entitled to evict the pongyi—Evidence Act (1 of 1892), s. 116—Licensee how far estopped.*

The plaintiffs who represent the original founder and builder of a *kyaung* sued for eviction of the defendant *pongyi*, who they claimed had been placed in possession of the *kyaung* by them as a mere licensee.

*Held*, that a *kyaung* once offered to a *pongyi* becomes *extra commercium* and cannot be regarded like an ordinary piece of immoveable property which can be occupied by a layman, bought, sold, or otherwise treated like an ordinary commercial property.

*Held, further*, that whilst section 116 of the Evidence Act operates to estop a licensee from denying his licensor's title, it does not make the license revocable under all circumstances, and that the founder of a *kyaung* who put a *pongyi* in possession thereof must prove his right to evict the *pongyi*, proof of license not being in itself sufficient for such purpose.

*Held, further*, that layman cannot evict a presiding *pongyi* in an ordinary state of affairs; and that a presumption of proper installation arises from a *pongyi* being placed by the founder of a *kyaung* in possession thereof.

*A. C. Mukerjee* for the appellant.

*Day* for the respondents.

\* Special Civil Second Appeal No. 59 of 1929 (at Mandalay) from the judgment of the District Court of Sagaing in Civil Appeal No. 78 of 1928.